FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-863

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

KENNETH KIZER, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

TABLE OF CONTENTS

Case:	Page
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)	3
Statutes:	
Social Security Act, Tit. XIX, 42 U.S.C. 1396 *et seq.*:	
§ 1902(a)(10)(C)(i)(III), 42 U.S.C. 1396a(a)(10)(C)(i)(III)	4, 5, 6, 7, 8
§ 1903(f), 42 U.S.C. 1396b(f)	4, 5, 6, 7, 8
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 137(b)(8), 96 Stat. 378	4
Pub. L. No. 98-369, § 2373(c)(1), 98 Stat. 1112	6
Miscellaneous:	
42 Fed. Reg. 57352 (1977)	4
44 Fed. Reg. 31045 (1979)	4
H.R. 4136, 98th Cong., 1st Sess. (1983)	6
H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. (1984)	5, 6, 7
S. Rep. 99-520, 99th Cong., 2d Sess. (1986)	8

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-863

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

KENNETH KIZER, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

The principal holding of the court of appeals is that a statement in an unofficial, unpublished, internal agency manual can rise to the status of a "legislative regulation" that binds the agency, even though the statement is contrary to the plain language of the relevant statute and to the agency's own, duly promulgated, rules. Recognizing the evident weakness of this holding, respondents seek to defend the judgment below mainly by reference to the court's alternative holding concerning the "DEFRA moratorium"—a holding upon which the court of appeals placed only secondary reliance and which occupies but three pages at the end of its decision. As we shall show, respondents' half-hearted efforts to salvage the court's principal holding are quite inadequate. And respondents' discussion of the DEFRA moratorium consists largely of quoting fragments of authorities which, when read in full, disprove the very points respondents proffer.

1. Unable to muster any credible defense for the court of appeals' holding that the regional office manual consti-

tutes a "legislative regulation," respondents abandon that holding altogether (Br. in Opp. 17 n.6). Instead they suggest that the court "could well have rested its judgment upon the ordinary deference which this Court and the courts of appeals have given similar regulatory material" (*id.* at 19). But respondents can point to no instance in which this Court has deferred to an unofficial, incorrect, unpublished and out-of-date internal manual, much less treated such a document as a binding "legislative regulation" as did the court of appeals.[1]

---

[1] Respondents make several errors of characterization. For example, they describe the regional office manual (Br. in Opp. 4) as a document "published by HHS' Health Care Financing Administration." See also Br. in Opp. 21 (referring to the manual as a "published interpretation[]," by which respondents mean that "it was published in the CCH Medicare & Medicaid Guide"). The manual, of course, was not "published" in the Federal Register or any other official source that would be relevant to determining whether it is a "regulation." And its foreword recites that it is "for the use of regional office employees only" (Pet. App. 26a-27a).

Respondents' contention that the manual is entitled to judicial deference as "regulatory material"—a contention that is wholly without merit for the reasons explained in the text—is at odds with their effort to preclude consideration of the manual's foreword on the ground that the manual was "never put in evidence" (Br. in Opp. 20). A party need not "put in evidence" "regulatory material" that is to be given "legislative effect."

Although expressly disclaiming that their argument rests on estoppel theories (Br. in Opp. 25), respondents frequently refer to the State's "reliance" on the regional office manual when passing the legislative amendments to the State Medicaid plan (see *id.* at 4, 21). That supposed reliance is untenable in light of the fact that, as respondents confirm (*id.* at 5), the State was advised of HCFA's contrary view *before* the state legislation was enacted. In any event, the manual provision upon which the state legislature allegedly relied in 1983 had been deleted from the manual in July 1980 (see Pet. 17). Respondents' protestation that the revised manual is not "in evidence" (Br. in Opp. 21-22 n.9) is no more persuasive than their observation that the foreword to the earlier manual is "not in evidence" (Br. in Opp. 20).

Respondents err in suggesting (Br. in Opp. 20) that the decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), a case which antedated the Administrative Procedure Act, "specifically sanctioned deference" to agency materials like the office manual at issue here. Quite the contrary. One need do no more than fill the ellipsis in respondents' truncated quotation from *Swift* (323 U.S. at 140, quoted in Br. in Opp. 20) to see that *Swift* disproves respondents' point. The Court there referred to "rulings, interpretations, and opinions *of the Administrator*" (323 U.S. at 140 (emphasis added)), and both the manual's own terms and the manner in which it was issued make it clear that it was not a ruling or opinion "of the Secretary." In addition, the Court in *Swift* pointed out, as the court below did not, that unofficial regulatory materials are "not controlling upon the courts by reason of their authority" (*ibid.*). Finally, in describing the circumstances in which a nonbinding agency interpretation might nonetheless be entitled to some weight, the decision in *Swift* recited several factors—"the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements" (*ibid.*)—all of which are absent here with respect to the HCFA regional office manual.

Respondents' other efforts to salvage the principal holding of the court below are equally unavailing because they, like the court of appeals, fail to recognize three basic facts. First, the manual provision is inconsistent with the statute and therefore the manual does not, as respondents contend (Br. in Opp. 22), "fill a gap" in the Act. Second, the manual provision is directly contradicted by a duly promulgated regulation, and it is that regulation which must govern. Third, whatever the status of the manual provision, it is clear that *the Secretary* never regarded the manual as a "regulation" or as having any binding force.[2]

---

[2] The Secretary has never delegated the authority to promulgate regulations to the Administrator of HCFA, much less to any subor-

Despite respondents' fanciful suggestions to the contrary, they cannot overcome the basic premise upon which the government's position rests: a family of three is not the "same size" as a family of two.

2. Respondents are on no firmer ground in defending the decision below on the second question presented, the scope of the DEFRA moratorium. As we will show, the legislative history of DEFRA specifically disproves every significant contention that respondents put forward. Preliminarily, however, it will be helpful to explain how respondents' discussion of DEFRA confuses two entirely separate points.

This case involves the 133-1/3% cap on Medicaid benefits under Section 1903(f) of the Social Security Act, 42 U.S.C. 1396b(f). That Section provides that the applicable income limitation for Medicaid purposes is an amount "equivalent to 133-1/3 percent of the highest amount which would ordinarily be paid to a family of the same size" under the State's AFDC program. For example, if a state's maximum AFDC payment were $300 per month for a family of two, the Medicaid income limitation or "cap" would be $400 per month for a family of two. Thus, the state would be in compliance with Section 1903(f) so long as its Medicaid eligibility level for a family of two remained at or below $400.

An altogether different question—not at issue in this case—may arise under Section 1902(a)(10)(C)(i)(III) of the Social Security Act, 42 U.S.C. 1396a(a)(10)(C)(i)(III). That provision, added by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 137(b)(8), 96 Stat. 378, requires that a state's Medicaid plan must establish a "single standard" for determining income and resource eligibility. That section was initially

---

dinate HCFA employee. See 42 Fed. Reg. 57352 (1977); 44 Fed. Reg. 31045 (1979).

read by some HHS employees (though not by the Secretary) to require that a family of two consisting of one adult and one child must have the same Medicaid eligibility level as a family of two consisting of two adults. It was this interpretation of the "single standard" provision—*i.e.*, requiring that all families of the same size be treated identically, regardless of how many adults are in the family—that some Congressmen criticized as an "overly literal" reading of TEFRA. See H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1367 (1984). And it was this interpretation of the "single standard" provision that was the subject of the DEFRA moratorium.

A simplified example will show how the 133-1/3% cap of Section 1903(f) operates independently of the "single standard" provision of Section 1902(a)(10)(C)(i)(III). Assume a state, as in the example above, where the highest monthly AFDC benefit ordinarily paid to a family of two is $300. If that state were to establish a Medicaid eligibility level of $350 for a family consisting of one adult and one child, and a separate level of $400 for a family consisting of two adults, a question could thereby be raised under the TEFRA "single standard" provision. But the 133-1/3% cap of Section 1903(f)—*viz.*, $400—would not be exceeded in either event. Conversely, if that same state were to set its Medicaid eligibility level for all families of two (whether consisting of two adults or of one adult and one child) at $450, there would be no question raised under the "single standard" provision. But the state would be in violation of the 133-1/3% cap of Section 1903(f).

During its deliberations preceding the enactment of DEFRA, Congress considered changes to both the "single standard" provision and the 133-1/3% cap. But Congress ultimately decided to amend the statute only with respect to the former. The DEFRA moratorium is expressly directed to "regulatory action against a State * * * by reason of such State's plan [for Medicaid] being deter-

mined to be in violation of section 1902(a)(10)(C)(i)(III)." Pub. L. No. 98-369, § 2373(c)(1), 98 Stat. 1112. The language of the moratorium thus makes plain that it is aimed at the "single standard" provision in Section 1902(a)(10)(C)(i)(III); it makes no mention of the 133-1/3% cap contained in Section 1903(f). On its face, therefore, the DEFRA moratorium does not apply to this case.

The legislative history reinforces the statutory language. It shows that Congress not only limited the moratorium to subjects other than those involved in this case, but also that Congress specifically rejected a proposal which would have accomplished the result that respondents obtained in the court of appeals.

Some members of the House of Representatives did disagree with the Secretary's implementation of Section 1903(f). The House Committee on Energy and Commerce recommended amending Section 1903(f) to provide explicitly that a state could set its Medicaid income level for two adults at an amount equal to the highest AFDC payment ordinarily made to a family of three. H.R. 4136, 98th Cong., 1st Sess. § 211 (1983); see Br. in Opp. App. 17. But that amendment was rejected in conference, and DEFRA contains no such provision. The Conference Report explained (H.R. Conf. Rep. 98-861, *supra*, at 1361):

> Present law
>
> Medically needy income levels for an SSI-related family of two adults with no income or resources, many [sic] be set at a level no higher than 133-1/3 percent of the AFDC standard for a two-person family with no income or resources.
>
> House bill
>
> The House bill permits States to establish medically needy levels for a family of two adults up to 133-1/3 percent of the three-person AFDC standard.

Senate amendment

No provision.

Conference agreement

The conference agreement does not include the House provision.

Respondents attempt to disengage themselves from the consequences of that legislative determination by attributing to Congress motives that appear nowhere in the legislative history. Thus, respondents suggest that Congress rejected the proposed amendment to Section 1903(f) because it was "too limited" and would be redundant in light of the "broader" moratorium (Br. in Opp. 6). But, as we have explained, the moratorium provision is not as broad as respondents propose. To the contrary, it is expressly limited to Section 1902(a)(10)(C)(i)(III), and it cannot rationally be thought to apply by implication to Section 1903(f), since Congress expressly *declined* to amend Section 1903(f) in that way.

Respondents attempt to bridge this gap by pointing to language in the Conference Report concerning "adult couple MNILs" (Br. in Opp. 6). Here again respondents have confused the "single standard" provision with the 133-1/3% cap. The Conference Report states that the moratorium was directed inter alia at the "position that the 'single standard' requirement of the TEFRA amendment prohibits States from establishing less restrictive medically needy income levels for single adults and couples because this would result in differences in medically needy income levels among groups of the same family size depending on the relative numbers of adults and children." H.R. Conf. Rep. 98-861, *supra* at 1367 (quoted in Br. in Opp. 7-8). This statement refers only to the TEFRA "single standard" provision; it does not refer to the 133-1/3% cap. There is no basis for assuming that Congress intended the moratorium to apply to a provision that is not mentioned

in the Conference Report's description of the moratorium's purpose, that is not within the scope of the moratorium's statutory language, and that the Conference Report refused to amend only six pages earlier. And once the clear statutory distinction between Section 1903(f) and Section 1902(a)(10)(C)(i)(III) is recognized, respondents' attempt to draw support from DEFRA's legislative history evaporates.[3]

At bottom, respondents' discussion of the DEFRA moratorium is an effort to inject sufficient confusion into this case to deflect attention from the court of appeals' principal, and profoundly disturbing, holding as to the status of an agency manual as a binding "legislative regulation." That holding does violence to settled principles of administrative law, thwarts specific congressional intent, and substantially undermines federal fiscal control over the Medicaid program. It is a decision that should not be permitted to stand.

For these reasons and those stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

---

[3] A Senate Report (S. Rep. 99-520, 99th Cong. 2d Sess. 21 (1986)) issued in connection with a subsequent effort to clarify the DEFRA moratorium makes it clear that the moratorium was not intended to apply to the Secretary's interpretation of Section 1903(f):

> [T]he moratorium does not eliminate the limits on income and resources of eligible individuals and families under section 1903(f) (including the requirements that the applicable medically needy income level not exceed the amount determined in accordance with standards prescribed by the Secretary to be equivalent to 133 1/3% of the most generous AFDC eligibility standard) * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483:40220